No. 76-1730

In the Supreme Court of the United States

OCTOBER TERM, 1977

WILLIAM B. RICHARDSON, PETITIONER

v.

J. T. SPAHR, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
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Relying principally on the Freedom of Information Act, 5 U.S.C. 552, petitioner brought these actions in the United States District Court for the Western District of Pennsylvania against the Department of Treasury, the Office of Management and Budget, the Central Intelligence Agency, and certain officers and employees of those agencies, to obtain records reflecting the receipt and expenditure of funds by the Central Intelligence Agency.[1] The government submitted detailed affidavits to the district court showing

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[1]Petitioner has unsuccessfully sought substantially the same information in two prior lawsuits, *United States* v. *Richardson*, 418 U.S. 166, and *Richardson* v. *Sokol*, 409 F. 2d 3 (C.A. 3), certiorari denied, 396 U.S. 949. Neither of those actions was brought under the Freedom of Information Act.

that the requested information (1) was exempted from disclosure by statute, (2) was classified "secret," and (3) could reasonably be expected to cause serious damage to the national security if released. On the basis of these affidavits, the district court held that the requested information was exempt from disclosure under Exemptions 1 and 3 of the Freedom of Information Act, 5 U.S.C. 552(b)(1) and (3), and, accordingly, granted summary judgment for the government (Pet. App. 2a-6a).

The court of appeals affirmed without opinion and subsequently denied petitioner's petition for rehearing (Pet. App. 1a).

Petitioner contends that the courts below erred in holding that the requested information was exempt from disclosure under Exemptions 1 and 3 of the Act. The decisions of the courts below were correct, do not conflict with a decision of any other court of appeals, and present no issue warranting further review by this Court.

1. The district court correctly held that the materials sought by petitioner were exempt from disclosure under Exemption 1 of the Freedom of Information Act, 5 U.S.C. (Supp. V) 552(b)(1), which covers information that is "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) [is] in fact properly classified pursuant to such Executive order." To justify nondisclosure under that exemption, therefore, the government must prove that the requested material is classified and that the document "is 'in fact, properly classified' pursuant to both procedural and substantive criteria contained in such Executive order" (H. R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974)).

That proof was made in this case. The affidavits submitted to the district court showed that the information

sought was classified "Secret" under Executive Order 11652, 3 C.F.R. 339, 340 (1974) (Pet. App. 19a; Addendum 17a, 38a-39a).[2] Moreover, the affidavits demonstrated that release of this information "could reasonably be expected to cause serious damage to the national security" (Addendum 7a, 17a, 39a-40a) and that classification of the documents therefore was proper.[3] As the district court concluded (Pet. App. 5a):

> A thorough review of the record conclusively establishes that the defendants have not only complied with the procedural requirements for obtaining a "secret classification" but have also demonstrated to the satisfaction of this Court, through detailed affidavits, that the classification was a proper one. More specifically, the public disclosure of those materials classified as "secret" would cause serious damage to our national security.

2. The district court also determined, as a separate basis for its decision, that the requested information was exempt from disclosure under Exemption 3 of the Act, 5 U.S.C. 552(b)(3), which at that time provided an exemption for all information "specifically exempted from disclosure by statute." The court, noting that Section 102(d)(3) of the National Security Act of 1947, 61 Stat. 498, as amended, 50 U.S.C. (1952 ed.) 403(d)(3), requires "the Director of Central Intelligence [to] be responsible for protecting intelligence sources and methods from unwarranted disclosure," stated (Pet. App. 3a):

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[2] "Addendum" refers to the separately bound Addendum to the government's brief filed in the Third Circuit.

[3] "The test for assigning 'Secret' classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security." 3 C.F.R. 340 (1974).

> [T]he defendants have submitted affidavits which conclusively establish that the financial information sought by plaintiff, if made public, could lead to the disclosure of the Agency's intelligence efforts, provide a good picture of United States intelligence capabilities, and would no doubt compromise and endanger the government's efforts to maintain national security.

Moreover, the court noted that, to further this objective, Congress had established "unusual provisions relating to the annual financing of the agency operations" (*ibid.*). Thus, Sections 5(a), 6, and 8(b) of the Central Intelligence Agency Act of 1949, 63 Stat. 209, 211, 212, 50 U.S.C. (1952 ed.) 403f(a), 403g, and 403j(b), in essence, authorize the Central Intelligence Agency to receive funds from other agencies, to expend these funds for objects of a confidential nature without regard to other provisions of law, and to account for these funds solely on the certification of the Central Intelligence Agency Director. The legislative history of the Central Intelligence Agency Act makes plain that it was intended to prevent the disclosure of operating information about the Agency that could jeopardize its efforts to protect the national security. See S. Rep. No. 106, 81st Cong., 1st Sess. 4 (1949); H.R. Rep. No. 160, 81st Cong., 1st Sess. 2 (1949). Thus, the disclosure petitioner sought was barred by statute.[4]

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[4]The recent amendment to Exemption 3, Pub. L. 94-409, 90 Stat. 1241, 1247, which became effective in March 1977, would not require a different result. The amendment limits Exemption 3 to information "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." Section 102(d)(3) of the National Security Act of 1947 requires the Central Intelligence Agency Director to protect intelligence sources and methods and thus requires the withholding of information that could compromise intelligence sources and methods if published.

Moreover, Representative Abzug, the amendment's primary sponsor in the House, specifically stated that Section 6 of the Central Intelligence Agency Act of 1947, 50 U.S.C. (1952 ed.) 403g, was an example of the exempting statutes covered by the language of the new Exemption 3. 122 Cong. Rec. H9260 (daily ed. August 31, 1976).

3. Congress has demonstrated its concern that the legitimate security interests of the Central Intelligence Agency not be compromised by improper disclosure of financial materials. Thus, it has declined to pass legislation that would have required the publication of the budgets of intelligence agencies. See 121 Cong. Rec. H9376-9377 (daily ed. October 1, 1975); 120 Cong. Rec. 17498 (1974). Similarly, the Senate, while establishing a permanent Select Committee on Intelligence to oversee intelligence activities, did not provide in the enabling resolution for the disclosure of funding authorized for intelligence agencies. See 122 Cong. Rec. S7563-7565 (daily ed. May 19, 1976).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.
AUGUST 1977.